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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS SEAN GREER, Defendant and Appellant.	B287247 (Los Angeles County Super. Ct. No. BA456529)
In re NICHOLAS SEAN GREER, on Habeas Corpus.	B292043 (Los Angeles County Super. Ct. No. BA456529)

Appeal from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed. Petition for writ of habeas corpus denied.

Byron C. Lichstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Nicholas Sean Greer of two counts of petty theft and three counts of making criminal threats, and the trial court sentenced him to four years in prison. Greer contends the trial court erred by failing to instruct the jury on self-defense; the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to timely disclose material, exculpatory information; and the cumulative effect of the purported errors requires reversal. Greer has also filed a petition for writ of habeas corpus, based on the same grounds. We ordered his petition considered concurrently with his direct appeal, directed the People to file an informal response, and invited Greer to file a reply. We affirm the judgment and deny the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Glamazon, Inc. is a business located in downtown Los Angeles. On April 17, 2017, Greer entered Glamazon's premises through an open gate and stole a bicycle belonging to the business. Glamazon employees Rodrigo Badillo and Adrian Lopez saw Greer take the bicycle and pursued him, Lopez on foot and Badillo in a van.

Greer rode the bicycle to the nearby office of Troski Cargo (Troski). He entered the company's warehouse on the bicycle,

rode it into the company's lobby, dropped it, and entered the unoccupied office of Troski's owner and president, Jose Yong. Troski employee Arely Razo told Greer he was not allowed to be there. Troski employee Arturo Guerra followed Greer into the office. Greer removed Yong's iPad from the office desk, placed it in his pants, and attempted to leave. Guerra grabbed him from behind and they both fell to the ground. Greer tried to strike Guerra with his elbows.

Badillo and Lopez, still pursuing Greer, arrived at Troski's offices. Badillo, Yong, and Troski employee Hector Frutos joined Guerra in struggling with Greer over the iPad. Greer swung his body, arms, and legs, attempting to break free; he also attempted to strike the men with his fists and kick them. Guerra, Badillo, Yong, and Frutos held Greer down. Frutos retrieved the iPad and Razo and Lopez called 911.

Once Greer had been subdued, the men released him from their hold, allowed him to stand up, and kept him in the office for approximately 10 minutes, until police arrived. Greer suffered a bloody nose, either from hitting the desk or from being punched by Yong during the struggle. Both during the struggle and while awaiting the arrival of police officers, Greer threatened that he would return, burn the business down, and kill everyone. He repeatedly pled with the men to let him leave.

Police officers arrived, detained Greer, and placed him in a patrol car. The witnesses, who stood approximately five feet away, gave statements to one of the officers, which were recorded by the officer's body camera. Greer yelled from the patrol car that he would be back, would kill them all, and would look at their faces "real close."

Guerra, Razo, and Frutos testified that the threats caused them to be fearful.

2. *Procedure*

A jury acquitted Greer of the second degree robbery but convicted him of two counts of petty theft (Pen. Code, § 484, subd. (a)),[1] and three counts of making criminal threats (against Guerra, Razo, and Frutos). (§ 422, subd. (a).) Greer admitted serving a prior prison term within the meaning of section 667.5, subdivision (b). At Greer's request, the trial court reduced two of the criminal threats charges to misdemeanors. It sentenced Greer to a term of four years in prison,[2] and imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, and a court operations assessment. Greer timely filed a notice of appeal.

DISCUSSION

1. *Self-defense instruction*

Defense counsel did not request, and the trial court did not give, a self-defense instruction. Greer contends that the court prejudicially erred by failing to sua sponte instruct the jury on self-defense, thereby violating his state and federal due process rights. In his habeas petition, Greer contends his counsel

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[1] All further undesignated statutory references are to the Penal Code.

[2] The trial court imposed a three-year sentence on count 2 (criminal threats), the base term, plus a one-year term for the section 667.5, subdivision (b) enhancement. It ordered terms of 180 days in jail on the remaining counts, to run concurrently to the base count.

provided ineffective assistance by failing to request such an instruction. We disagree with both contentions.

a. *Applicable legal principles*

A trial court has a sua sponte duty to instruct regarding a defense if there is substantial evidence to support it and it is not inconsistent with the defendant's theory of the case. (*People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Saavedra* (2007) 156 Cal.App.4th 561, 567.) However, a trial court does not err in failing to give a self-defense instruction where there is no substantial evidence to support it. (*People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49; see generally *People v. Nguyen* (2015) 61 Cal.4th 1015, 1048–1049; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1050.) Substantial evidence is that sufficient to deserve consideration by the jury, that is, evidence a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263; *People v. Ross*, at pp. 1049–1050.) The existence of any evidence, no matter how weak, will not justify an instruction. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In deciding whether the evidence is sufficient to support an instruction, a court does not weigh the credibility of the defense evidence, but only considers whether there was evidence that, if credited, was sufficient to support the defense. (*People v. Salas*, at p. 982; *People v. Saavedra*, at p. 567.) Doubts as to the sufficiency of the evidence to warrant an instruction should be resolved in favor of the accused. (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.) We independently review the question of whether the trial court erred by failing to instruct on a defense. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

It is well settled that a defendant cannot assert self-defense if "through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony)," he "has created circumstances under which his adversary's attack or pursuit is legally justified." (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; *People v. Rangel* (2016) 62 Cal.4th 1192, 1226; *People v. Valencia* (2008) 43 Cal.4th 268, 288.) As Greer appropriately acknowledges, a private person is statutorily authorized to defend against a perpetrator's commission of a crime and to arrest a perpetrator who commits an offense in his or her presence. (See §§ 692, 693, 694 [a party about to be injured, and other parties, may lawfully offer resistance sufficient to prevent a public offense, including an illegal attempt to take property by force]; §§ 834, 835, 837 [private person may arrest another for a public offense committed or attempted in his presence, and may subject the arrestee to "such restraint as is reasonable for his arrest and detention"]; see *People v. Fosselman* (1983) 33 Cal.3d 572, 579.) Accordingly, "if an owner/occupant lawfully uses force to defend himself against aggression by a trespasser, then the trespasser has *no* right of self-defense against the owner/occupant's use of force." (*People v. Johnson* (2009) 180 Cal.App.4th 702, 709–710; *People v. Adams* (2009) 176 Cal.App.4th 946, 952 (*Adams*) [when a private citizen employs reasonable force to make an arrest, " 'the arrestee is obliged not to resist, and has no right of self defense against such force' "].)

b. *The trial court did not err by omitting a self-defense instruction*

Here, it was undisputed that Greer entered Glamazon's property without permission and stole the company's bicycle. Lopez and Badillo, Glamazon's employees, were therefore

privileged to chase Greer, wrest the bicycle from him, and effectuate a citizen's arrest. Before Lopez and Badillo could stop Greer, he trespassed into Troski and took Yong's iPad. Therefore, Yong, along with Troski employees Guerra and Frutos, were likewise entitled to restrain Greer and retake the iPad from him. The victims' actions of detaining and subduing Greer, a trespasser and a thief, were legally justified; Greer's use of force to resist them was not, because his unlawful conduct created the circumstances under which the victims used force. (*People v. Johnson*, *supra*, 180 Cal.App.4th at pp. 709–710; *People v. Fosselman*, *supra*, 33 Cal.3d at p. 579 [there is no right to defend against a valid arrest; defendant had a "duty not to resist" when a private person restrained him].)

Greer argues, however, that he was entitled to a self-defense instruction because there was evidence the victims used excessive force in restraining him, and the jury could have concluded his threats were "a reasonable attempt to terminate the excessive force." (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 273 [if a victim resorts to "*unlawful* force" the defendant-aggressor regains the right of self-defense]; *People v. Adams*, *supra*, 176 Cal.App.4th at p. 952 [use of unreasonable or excessive force to make an arrest constitutes a public offense, and all persons have a right to prevent injury to themselves by resisting].) Greer acknowledges that there is an absence of authority holding self-defense can be an affirmative defense to a criminal threats charge. Nonetheless, he argues it should be, because sections 692 and 693 state that a party may engage in lawful "resistance" to the commission of a public offense, and it has been held that "[r]esistance, at least in common parlance, does not *require* actual force directed against the person or thing

that is being resisted." (*People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1528, 1530 [flight constitutes willful resistance to a peace officer].)

We do not necessarily agree with Greer's contention. But assuming arguendo that self-defense may be a defense to a criminal threats charge, the trial court here did not err by failing to give the instruction because there was insufficient evidence supporting it.

Greer argues that the evidence showed: five "physically imposing" men restrained him and pinned him to the ground; Yong punched him in the face; Lopez brought a stick into the office with the intent to beat him up; and he was alone and unarmed. In his view, "punching an unarmed and outnumbered thief in the face over a minor property crime constitutes excessive force."

These contentions are unavailing. First, characterizing the men as physically imposing is something of an overstatement. The videotape shows the men to be fit and muscular, but they are of average size. Second, Lopez did pick up a stick or board when entering Troski and Badillo speculated that it was "probably [Lopez's] intention" to beat Greer up. But Lopez testified he did not participate in the efforts to restrain Greer, never touched him, did not use the stick, and was only in the office for a "couple of seconds." The video shows that Lopez dropped the stick moments after entering the office, and no evidence showed he ever used it or that Greer was aware of its presence. The stick evidence is thus irrelevant.

Third, as we have discussed, the men were entitled to restrain Greer by reasonable means. (§ 835 [the person arrested "may be subjected to such restraint as is reasonable for his arrest

and detention"].) The fact five men were present is of no moment. Lopez did not participate in restraining Greer, and it took all four of the remaining men to subdue Greer and prevent his escape. (See § 839 [a person making an arrest may "summon as many persons as he deems necessary to aid him therein"].) The men were entitled to pin Greer because he struggled violently in his efforts to escape. To accomplish this, Badillo held his knees, another man held his arms, and another placed his knee on Greer's chest. Once Greer stopped struggling, the men allowed him to stand up and, of his own volition, sit down against the office wall. From this undisputed evidence, jurors could not have concluded the men used excessive force.

Fourth, the fact Yong may have hit Greer once during the struggle did not constitute evidence of excessive force sufficient to reinvest Greer with the right of self-defense. Greer's argument fails to take into account his own behavior during the incident. Greer did not meekly submit when he encountered the men; instead he used violent means to try to escape. The witnesses consistently testified that when they tried to stop Greer and retrieve the iPad, he was aggressive and violently struggled, including swinging his arms, fists, elbows, and body, attempting to kick them, and breaking "a couple" of items. Indeed, Greer hit and elbowed some of the men. According to Badillo, Yong punched Greer because Greer was "getting violent with" them. Yong likewise testified that when they tried to take the iPad, Greer "started to get violent." According to Yong, he did not "hit [Greer]. I just tried to defend myself. It's when he tried to hit me we moved the desk and that's when he became violent." Yong explained that the men "got physical" with Greer because "we

had to reply to his violence, and obviously one has to defend themselves."

Under the circumstances, Yong was entitled to strike back to defend himself against Greer's attempts to punch, kick, and elbow him and the others. (See *People v. Ross*, *supra*, 155 Cal.App.4th at p. 1044 [if A walks up to B and punches him without warning, "B would be entitled under the law of this state to punch A immediately, without further ado, provided he acted out of an actual and reasonable belief that such action was necessary to avert imminent harm" and used no more than reasonable force]; *People v. Myers* (1998) 61 Cal.App.4th 328, 330 [a person may, in appropriate circumstances, "use reasonable force to resist a battery even when he has no reason to believe he is about to suffer bodily injury"]; CALCRIM No. 3475 [if a trespasser does not leave and it reasonably appears he poses a threat to the property or the occupant, the occupant may use reasonable force; if the trespasser resists, the occupant "may increase the amount of force he or she uses in proportion to the force used by the trespasser"].) Viewing the evidence most favorably for Greer, Yong hit him in the face once, during the struggle, to defend against Greer's efforts to hit Yong. There is no showing the punch caused significant injury. Under these circumstances, no reasonable jury could find Yong or the other men used excessive force.

Adams, *supra*, 176 Cal.App.4th 946, does not compel a contrary result. There, Adams committed a hit-and-run accident and ran into a park. According to him, two men from the victim's car, Bui and Gallegos, caught up with him. They each pushed Adams, and Gallegos punched him. When it appeared Bui was preparing to throw another punch, Adams swung at the same

time, knocking Bui down and causing injury. The trial court instructed on self-defense and on "citizen's arrest." (*Id.* at pp. 949–951.) In response to a jury question, the court stated that a citizen making an arrest may use reasonable force, but if the citizen uses excessive force, the defendant has the right to defend himself. (*Id.* at p. 951.) On appeal, Adams argued the court's response was erroneous, because it implied he had the right to self-defense only *after* excessive force was employed, rather than at the point he reasonably believed a threat was imminent, i.e., he had to wait for the second punch to be thrown before defending himself. (*Id.* at p. 953.) *Adams* assumed without analysis that the second punch would have constituted excessive force, but found the instructions given properly stated the law. (*Id.* at pp. 953–955.)

We do not understand *Adams* to hold that a punch is, ipso facto, excessive force. *Adams* devoted no analysis to the question, but based on defendant Adams's testimony, it is easy to understand the court's assumption. According to Adams, when Gallegos and Bui caught up with him he offered to pay for the damage to their car. In response, Bui swore at him, challenged him to a fight, and pushed him; Gallegos shoved him; Bui pushed him a second time; Gallegos struck him; and Bui prepared to punch him. (*Adams*, *supra*, 176 Cal.App.4th at p. 949.) Nothing like that occurred here. As explained, the undisputed evidence showed all the force used against Greer—including Yong's punch—was in response to Greer's violent conduct, and the men released him once he stopped resisting.

In any event, even if there was sufficient evidence of excessive force, there was a dearth of evidence showing Greer had the requisite mental state. Self-defense requires a showing that

the defendant reasonably believed he was in imminent danger of suffering bodily injury or being touched unlawfully; reasonably believed the immediate use of force was necessary to defend against that danger; and used no more force than was reasonably necessary. (*People v. Johnson*, *supra*, 180 Cal.App.4th at p. 709.) The defendant "must have acted because of that belief.' " (*Ibid.*)

Greer did not testify. Certainly, as he points out, a defendant's mental state may be established by means of circumstantial evidence, or through the testimony of other witnesses. (*People v. Oropeza*, *supra*, 151 Cal.App.4th at p. 82; *People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055.) But the problem for Greer is that no other witness's testimony supported a conclusion that he had the requisite mental state and made the threats to induce the men to stop using force. And, the circumstantial evidence strongly points to the opposite conclusion. Greer's threats were one of several ploys he used to attempt to convince the men *to let him go before police arrived*, not to convince them to cease using force. He variously apologized, explained he was stealing to buy crack cocaine, said he would never "do it again," attempted to bribe the men with $5, and made the threats, all in an effort to convince them to let him leave the premises.

Moreover, the evidence showed Greer made the threats not only while pinned on the ground, but also after the men let go of him in the office, *and* even after the police arrived, when any danger had surely passed. While seated in the police car, Greer repeatedly stated he would "be back," threatened to "kill" everybody, and said he was looking "at y'all faces real close." (*Sic*.) This evidence conclusively undercuts any inference that Greer made the threats because he believed he was in danger.

Greer's hypothesis that he may have had one intent during the struggle and a different intent after police arrived is not persuasive. It is highly unlikely the jury would have engaged in such mental gymnastics in the absence of any compelling evidence showing either excessive force, or an actual belief Greer made the threats because he was concerned about the amount of force used. The existence of *any* evidence, no matter how weak, will not support a jury instruction. (*People v. Wyatt*, *supra*, 55 Cal.4th at p. 698.) Because there was no substantial evidence supporting the instruction, the trial court did not err by omitting it.[3]

Greer's argument that his trial counsel provided ineffective assistance by failing to request a self-defense instruction likewise fails. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's failings, the result would have been more favorable for defendant. (*People v. Mickel* (2016) 2 Cal.5th 181, 198; *People v. Roa* (2017) 11 Cal.App.5th 428, 454.)

In support of his petition, Greer attaches a copy of an email sent from trial counsel to appellate counsel, in which trial counsel avers that he was "not aware that a self-defense instruction would be permissible," a statement Greer contends was legally erroneous. Because, as we have explained, there was not substantial evidence supporting a self-defense instruction, counsel was not ineffective for failing to request one. (See, e.g.,

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[3] In light of our conclusion, we find it unnecessary to address Greer's arguments regarding prejudice.

People v. Kendrick (2014) 226 Cal.App.4th 769, 780 [counsel is not required to indulge in idle acts to appear competent]; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance"].) And, because the trial court would have properly refused any such request, Greer cannot demonstrate prejudice. Accordingly, his ineffective assistance claim fails.

2. *Late disclosure of* Brady *material*

Greer argues, in his direct appeal and in his habeas petition, that his convictions must be reversed because the deputy district attorney violated *Brady*, *supra*, 373 U.S. 83, by failing to timely disclose to the defense that some of the witnesses asked an officer whether their status as victims in the instant matter could serve as the basis for U-Visa applications. A U-Visa is a type of temporary nonimmigrant visa that provides legal status for noncitizens who assist in the investigation of serious crimes in which they have been victimized. (*People v. Morales* (2018) 25 Cal.App.5th 502, 506; 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. 214.14; *Fonseca-Sanchez v. Gonzales* (7th Cir. 2007) 484 F.3d 439, 442, fn. 4.) We agree the information should have been disclosed earlier, but the People's misstep did not result in a *Brady* violation and does not require reversal.

a. *Additional facts*

Jury selection concluded on September 12, 2017. On that date the parties made opening statements and the prosecutor conducted the direct examination of Badillo, the first witness. The next morning, before defense counsel began Badillo's cross examination, the prosecutor explained to the trial court that the investigating officer, Steven Salas, informed him that morning that "at some point during the pendency of this case he was

asked by witnesses in this case whether they would basically qualify or if they could apply for a U Visa." The prosecutor immediately informed defense counsel. Defense counsel and the prosecutor, with the aid of a Spanish language interpreter, "interviewed the relevant witnesses as to this point; two of the witnesses said that they had applied for a U Visa; two of [the] witnesses said that they were interested and they may apply." The witnesses told the attorneys that they had inquired of Officer Salas about the U-Visas when they appeared for the preliminary hearing. Over the prosecutor's objection, the trial court permitted defense counsel to question the victims about the visas, on the theory that their testimony might be colored by an "ulterior motive" in light of the U-Visa requirement that in order to qualify for the visa they must be crime victims.

Thereafter, the following testimony was adduced. Defense counsel elicited from Badillo that he was interested in applying for a U-Visa. Badillo stated, "they told me there was an opportunity" to apply for a U-Visa based on the instant matter. He understood that "when you're a victim of a crime or you get hit by somebody," the visa "gives you permission to be here" and work.

Yong confirmed that he was applying for a U-Visa. He explained, "I am trying to resolve my legal status right now with my lawyer and I commented to him about this case and he's using this." When asked, "you're going to be using this case and your involvement in this case to help you get that U-Visa?" Yong answered, "Of course."

Defense counsel elicited testimony from Officer Salas about the nature of the U-Visa program, as follows. "The U-Visa is basically a program that establishes a work permit for the people

that are victims and witnesses of crimes. It's kind of—pretty much commonplace. People do know about this." The program assists law enforcement because it ensures "the community is not afraid to call 911 and have police respond." Salas confirmed that an applicant had to qualify for the U-Visa by "being a victim or witness to a crime." Some of the witnesses in the instant matter asked him about U-Visas at the crime scene, when his body camera was off. Salas told them that the program was available to crime victims and witnesses "as long as they [cooperate] with the police."

After Officer Salas's testimony, defense counsel asked to recall four of the civilian witnesses in an effort to impeach Salas, based on the following circumstances. Salas had testified that he turned off his body camera, and then remembered he had not asked whether the victims believed Greer's threats were credible. He had a brief, unrecorded conversation with them about the threats, and also about the U-Visas. Salas's testimony that the U-Visa conversation occurred at the scene contradicted one or more of the witnesses' statements, made during their interviews with the prosecutor and counsel, that the U-Visa conversation transpired at the preliminary hearing. Based on this contradiction, defense counsel sought to recall the witnesses to impeach Salas, in hopes of also showing that the officer's testimony about their off-camera discussions about their fear was inaccurate. The prosecutor objected under Evidence Code section 352. The trial court agreed with the prosecutor and declined to allow recall of the witnesses.

Defense counsel then stated it had been "brought to [his] attention" that he had not questioned Razo about her U-Visa status because he was "not comfortable doing that in front of this

jury because I was not able to voir dire . . . as to the [U-Visa]." Counsel asked to recall Razo to question her about the issue. The trial court denied the request, reasoning that Razo had been present as a witness, counsel had been aware of the visa issue at the time, and it would not allow her to be recalled "so we can piggyback to the other issue."

Defense counsel did not object that the late disclosure of the U-Visa information violated *Brady*, nor did he request a continuance to explore the U-Visa information, move for a mistrial, ask for a late-discovery instruction, or otherwise challenge the late discovery.

b. *Law applicable to* Brady *claims*

The due process clause of the federal constitution requires a prosecutor to disclose to the defense all material evidence known to the prosecution team that is favorable to the defendant, even in the absence of a request. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432–441; *Brady*, *supra*, 373 U.S. at p. 87; *People v. Clark* (2011) 52 Cal.4th 856, 981–982.) The duty extends to evidence known only to police investigators and not the prosecutor. (*People v. Lucas* (2014) 60 Cal.4th 153, 273, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.) A "true *Brady* violation occurs only when three conditions are met: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*People v. Lucas*, *supra*, 60 Cal.4th at p. 274; *Strickler v. Greene* (1999) 527 U.S. 263, 281–282; *People v. Masters* (2016) 62 Cal.4th 1019, 1067.) " ' "Prejudice, in this context, focuses on 'the materiality of the

evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" [Citation.]' " (*People v. Masters*, at p. 1067; *People v. Lucas*, at p. 274 ["In the case of impeachment evidence, materiality requires more than a showing that 'using the suppressed evidence to discredit a witness's testimony "*might* have changed the outcome of the trial" ' "].) We independently review the question of whether a *Brady* violation occurred. (*People v. Masters*, at p. 1067.)

c. *Forfeiture*

Preliminarily, we agree with the People that Greer's *Brady* claim has been forfeited. "[D]efendant's contentions are based on information that was known or available to him at trial. Consequently, his failure to make proper objections, request appropriate sanctions, or seek any continuance on the matter is fatal to his contentions on appeal." (*People v. Morrison* (2004) 34 Cal.4th 698, 714.) Nonetheless, we address the merits in light of Greer's contention that his trial counsel was ineffective.

d. *Greer has failed to establish either a* Brady *violation or ineffective assistance of counsel*

We have no quarrel with the proposition that a witness's application for a U-Visa is potentially relevant as impeachment evidence. "To obtain a U-Visa the applicant must: (1) 'possess specific facts regarding the criminal activity leading a certifying

official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity,' [citation], and (2) [demonstrate that he or she is] 'being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested.' [Citation.]" (*Romero-Perez v. Commonwealth* (Ky.Ct.App. 2016) 492 S.W.3d 902, 906; *Cazorla v. Koch Foods of Mississippi*, *L.L.C.* (5th Cir. 2016) 838 F.3d 540, 545.) U-Visas "generally entitle their holders and their family members to four years of nonimmigrant status; holders may . . . apply for lawful permanent residence (a 'green card') after three years;" and aliens with pending, bona fide U-Visa applications may obtain work authorization. (*Cazorla v. Koch Foods of Mississippi*, *L.L.C.*, at p. 545.) Thus, the prospect of a U-Visa could give a witness an incentive to provide favorable testimony for the prosecution. (See *Romero-Perez v. Commonwealth*, at p. 906 ["One can readily see how the U-Visa program's requirement of 'helpfulness' and 'assistance' by the victim to the prosecution could create an incentive to victims hoping to have their U-Visa's granted"]; *State v. Del Real-Galvez* (2015) 270 Or.App. 224, 229–232 [346 P.3d 1289, 1292–1294].) Indeed, the People concede that U-Visa evidence may be impeaching.

But Greer has failed to establish a *Brady* violation. First, the evidence was not suppressed, because it was disclosed during trial, in time for the defense to make use of it effectively. "Evidence actually presented at trial is not considered suppressed for *Brady* purposes, even if that evidence had not been previously

disclosed during discovery." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 467 (*Mora*); *People v. Verdugo* (2010) 50 Cal.4th 263, 281; *People v. Morrison*, *supra*, 34 Cal.4th at p. 715.) In *People v. Lucas*, for example, the People failed to timely disclose a police report that contained information favorable to the defense. The prosecutor turned the report over to the defense two days after the witness who was the subject of the report testified. (*People v. Lucas*, *supra*, 60 Cal.4th at p. 273.) *Lucas* reasoned: "The record . . . does not support the assertion that the police report was suppressed by the prosecution. It is true that the San Diego Police Department forms part of the 'prosecution team,' and therefore, the prosecution had constructive possession of the report. Even so, the prosecution's eventual disclosure upon gaining *actual* possession cured any *Brady* violation." (*Id.* at p. 274.)

Greer fails to demonstrate that the delay in disclosure resulted in prejudice. In considering a claim of delayed disclosure, *Mora* looked to a test used by the First and Tenth Circuits, namely, whether " 'defense counsel was "prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case." ' " (*Mora*, *supra*, 5 Cal.5th at p. 467; see *United States v. Tyndall* (8th Cir. 2008) 521 F.3d 877, 882 ["A mid-trial disclosure violates *Brady* only if it comes too late for the defense to make use of it"].) In *Mora*, the court found the late disclosure of numerous diagrams, police reports, and other documents was not prejudicial. (*Mora*, at p. 467.) The materials were provided during trial; at counsels' request, the court provided a recess to allow them to contact additional witnesses; the defense had the opportunity to review and use the tardily disclosed information; and, "[m]ost

tellingly, . . . neither [defendant] sought a remedy the court did not provide." (*Id.* at p. 469.)

Here, the prosecutor informed defense counsel of the witnesses' U-Visa queries near the beginning of trial, before cross-examination of any witness occurred. Defense counsel interviewed the witnesses regarding the U-Visas. During his testimony, Officer Salas explained what a U-Visa was, alerting the jury to the possibility that the witnesses might have an incentive to favor the prosecution. Defense counsel questioned two of the witnesses regarding their hopes of obtaining U-Visas based on their cooperation in the case, evidence from which the jury could potentially infer bias. Nothing prevented counsel from examining the other two witnesses as well.

Greer points out that an attorney must be given information in time to allow its use with " 'some degree of calculation and forethought.' " But counsel had that opportunity here. The evidence was not complex. There was no need, for example, to seek out additional witnesses, employ new experts, digest new scientific evidence, pursue additional leads, or craft a new trial strategy. Instead, the only value of the evidence to the defense was obvious: Greer could argue the witnesses might slant their testimony in favor of the prosecution in hopes of obtaining the visas. This inference could readily have been drawn from the evidence counsel had in his possession, with no further ado. And, the fact no further investigation was necessary is shown in counsel's choice not to seek a continuance or any additional remedy at trial. (See *Mora*, *supra*, 5 Cal.5th at p. 469.) In short, to the extent Greer complains that defense counsel did not use the U-Visa information effectively, this was not due to its late disclosure.

Greer argues, based on his counsel's comment below, that the defense was hamstrung in its ability to examine the witnesses because counsel had not had the opportunity to conduct voir dire on the "sensitive" subject of the U-Visas. But this argument is a red herring: counsel *did* question two of the witnesses regarding the U-Visas and elicited a description of the program from Officer Salas, undermining any contention that the absence of voir dire was a significant consideration. Except for the voir dire issue, and as in *Mora*, Greer "provide[s] no example of choices that would have differed had the discovery been made available earlier, and the record reveals no obvious defense strategy foreclosed by the late disclosure." (*Mora*, *supra*, 5 Cal.5th at p. 469.)

Greer also complains that the trial court "cut short" the defense's opportunity to elicit the U-Visa information by mistakenly sustaining an objection to one of defense counsel's questions to Officer Salas. Not so. The trial court allowed Salas to explain the U-Visa program in response to defense counsel's query. Defense counsel then asked: "Rodrigo Badillo, Hector Frutos, Arely Razo and Jose Yong they are all using this case as a basis to qualify or apply for a U-Visa?" The prosecutor objected, "Lacks foundation." The trial court sustained the objection, stating: "Foundation. I think you asked that question directly of those witnesses. Sustained on that." The trial court did not err. Defense counsel *did* ask two of the witnesses about their U-Visa plans. As to the other two, the foundational objection was properly sustained because there was no showing the officer knew anything about the witnesses' plans; his testimony was that they had asked him about the U-Visas, nothing more.

Next, Greer argues that the trial court erred by denying his request to recall four of the witnesses to elicit that they spoke to Officer Salas at the preliminary hearing, rather than at the crime scene. The court reasoned: "The important point . . . was that the defense counsel had an opportunity to cross-examine [the witnesses] on [the U-Visa issue] for possible bias. [D]etermining whether or not this officer spoke with the witnesses at [the] preliminary hearing or on scene I think is of tangential importance and I'll cite [Evidence Code section] 352 for not recalling four witnesses to further lengthen this trial." Like the trial court, we fail to see much probative value in the location where or when the conversation occurred. The pertinent question was the witnesses' interest in obtaining the visas based on their participation in the case, not the conversation's location or timing, as Greer appears to acknowledge elsewhere in his argument. The trial court's ruling was correct.

Nor do we find merit in Greer's ineffective assistance claim, raised in both his direct appeal and his habeas petition. Greer argues that counsel's failure to interpose a *Brady* objection, move for a mistrial, or seek a continuance amounted to ineffective assistance. As noted *ante*, to establish ineffective assistance, a defendant must show not only that counsel's performance was subpar, but also a reasonable probability that, but for counsel's failings, the result would have been more favorable for defendant. (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198.) Because there was no *Brady* violation, counsel did not err by failing to object on *Brady* grounds or move for a mistrial.[4] In light of the fact counsel

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[4] In his email to appellate counsel, trial counsel stated that he believed the U-Visa information was discoverable, but not "*Brady*" material. Given our conclusion that the information was

was able to interview the witnesses before they testified, it was a reasonable tactical choice not to move for a continuance, which, in any event, would likely have been denied given the nature of the evidence at issue.[5] (See *Mora*, *supra*, 5 Cal.5th at p. 466 [a trial court has discretion to determine what sanction is appropriate to ensure a fair trial].)

Greer argues that defense counsel did not use the U-Visa information effectively. He complains that counsel only questioned two of the four witnesses about their U-Visa plans; he omitted to ask Razo and Frutos about the issue. Moreover, he urges, counsel failed to argue, based on the U-Visa evidence, that the witnesses were biased, which could have cast doubt on testimony from Razo and Frutos that Greer's threats actually

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not suppressed because it was disclosed during trial and the defense had an adequate opportunity to make use of it, trial counsel's understanding is correct.

[5] In his email, trial counsel stated: "As it pertains to the discovery violation, I would have to review the transcript because I seem to remember discussing the issue of mistrial. Additionally, if [I] remember correctly, I requested a late discovery . . . instruction as to the information but I think that it was denied. I think I also discussed the issue [with] the violation and requiring more time to research the matter but I think that was denied." Greer argues these statements demonstrate trial counsel had no tactical reason for his actions, given that trial counsel did not actually request a continuance, a mistrial, or (as to the U-Visas), a late discovery instruction. We are not persuaded. The email does not show counsel lacked a strategic reason for his conduct of the trial; instead it simply shows that, with the passage of time, counsel could not recall the details of the matter without reviewing the transcript.

caused them to be in sustained fear (an element of the criminal threats offenses). (§ 422; *People v. Ramos* (2016) 5 Cal.App.5th 897, 910.)

Greer has failed to establish a reasonable probability that, but for counsel's purported failings, the result would have been more favorable for him. The witnesses testified consistently with each other, with their statements to Officer Salas at the scene, and with Razo's 911 call. All these statements were made at or very shortly after the incident, at a time when the witnesses would have been unlikely to have had either the time or the inclination to fabricate a false account. And, much of the testimony was corroborated by the video evidence. One video clip showed Greer riding into the Troski warehouse on a bicycle, pursued by Badillo and Lopez. Another showed him riding through the warehouse, and a third depicted him riding into the Troski lobby, dropping the bike, and entering Yong's office. The video showed the men pursued him into the office, while Razo placed a telephone call. Further, the officers' body cameras recorded Greer's threats made in the police car, including: "I'll be back. I'll be back"; "I don't give a fuck how much time I get man. If somethin' happen to me, I'ma killin' everybody"; and "Let me look at y'all face[s] real close." (*Sic*.) Thus, there was overwhelming and undisputed evidence that Greer committed the theft and made the threats.

The only element that the defense could hope to challenge was whether Greer's threats caused Razo, Guerra, and Frutos—the victims of the threats offenses—to suffer sustained fear. All three credibly testified that they were afraid. Razo, for example, explained that she did not know what Greer was capable of, but given his conduct, she felt as though he would follow through on

his threats. This was eminently reasonable: Greer's conduct had been brazen, rash, and violent, and his threats were repeated and specific. There was no evidence Guerra was interested in a U-Visa, yet he testified he was afraid when Greer made the threats and was "still scared" at the time of trial, giving credence to Razo's and Frutos's testimony that they, too, had been afraid. Greer offers, in his habeas petition, no evidence regarding how Razo and Frutos might actually have testified regarding the U-Visas; and presumably, based on the prosecutor's explanation to the court, only one of them had in fact applied for a U-Visa. Given this evidentiary void, we are unable to conclude Frutos's and Razo's testimony regarding the U-Visas would have been significant or even particularly favorable for the defense. Further, it was not as though counsel was precluded from arguing the point: even without asking Razo and Frutos about U-Visas, defense counsel was able to cogently argue there was no sustained fear, based on, among other things, the fact the men released Greer from their grasp before police arrived; the witnesses' demeanor immediately after the incident, as depicted in the videos, did not show fearfulness; the witnesses did not ask about protective measures; and the witnesses were not asked whether they were fearful when Officer Salas's body camera was on. In sum, Greer has failed to establish his ineffective assistance claim.

3. *Cumulative error*

Greer argues that, even if the purported errors were individually harmless, when viewed in combination they were prejudicial, requiring reversal. But "[b]ecause we have found no error, there is no cumulative prejudice to evaluate." (*People v. Lopez* (2018) 5 Cal.5th 339, 371.)

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.